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WITNESSES' PRIVILEGE FROM SELF-INCRIMINATION.—The privilege of refusing to testify in a court of law concerning any matter which tends to incriminate one has so long been incorporated into the English common law [1] as to be a universally recognized right among English speaking peoples. This right has been said to be an outgrowth of the systems of government of the Anglo-Saxon race. The Latin peoples, with highly centralized governments, lost sight of individual rights, and under their systems men were often lawfully oppressed by inquisitorial acts, and even subjected to torture in the effort to make them incriminate themselves.[2] In England, on the other hand, individual rights were so cherished as to protect a man against being forced to incriminate himself, and the doctrine was incorporated into the United States Constitution,[3] and into the constitutions of practically all of the States.

A witness cannot claim this constitutional immunity unless at the time he is called upon to testify he may be indicted and punished for such an offense as his testimony might disclose.[4] For instance, the witness must testify where the statute of limitations bars a

[1] Entick *v.* Carrington, 19 How. St. Tr. 1030.
[2] United States *v.* James, 60 Fed. 257.
[3] 5th Amendment.
[4] Brown *v.* Walker, 161 U. S. 591; Ex parte Cohen, 104 Cal. 524, 38 Pac. 364; State *v.* Jack, 69 Kan. 387, 76 Pac. 911.

prosecution for the offense which might be disclosed,[5] or where the witness has been tried and acquitted of the offense.[6] Nor can an officer of a corporation refuse to testify on the ground that his testimony might incriminate the corporation,[7] although if he himself is liable to prosecution he may claim the constitutional privilege of refusing to testify.[8] Often statutes give the witness complete immunity from any punishment for any offense which is brought to light by his testimony, and although there are some decisions to the contrary, the correct doctrine, and that established by the weight of authority, is that under such statutes a witness may be compelled to testify.[9] But the statute must give the witness complete immunity from all the legal consequences of his disclosures, or he cannot be forced to testify.[10] The leading case upholding the doctrine that where a statute gives the witness complete immunity he may be compelled to testify is *Brown* v. *Walker*,[11] decided by the United States Supreme Court in 1896, and followed by the federal courts ever since.[12] In this case four of the judges dissented, on the grounds that (1) the statute could not give the witness complete immunity because it was a federal statute, not binding on State courts, (2) because the amendment was intended to protect the witness from infamy and disgrace as well as criminal prosecution, and (3) because by the enactment of the statute Congress was endeavoring to usurp the administrative prerogative of granting pardons. The first question had not been brought up before this case was decided, but the decided weight of authority in this country upholds the decision of the Supreme Court that the

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[5] Calhoun *v.* Thompson, 56 Ala. 166; Manchester, etc., R. Co. *v.* Concord R. Co., 66 N. H. 100, 20 Atl. 383.

[6] Lothrop *v.* Roberts, 16 Colo. 250, 27 Pac. 698. See also Ex parte Cohen, *supra*, where Harrison, J., in delivering the opinion, said: "If at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense; or if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law; if the offense is barred by the statute of limitations, and there is no pending prosecution against the witness, he cannot claim any privilege under this provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and, consequently, he is not compelled to be a witness against himself."

[7] Meade *v.* Southern, etc., Assoc., 119 App. Div. 761, 104 N. Y. Supp. 523; London *v.* Everett H. Dunbar Corp., 179 Fed. 506.

[8] Chesapeake Club *v.* State, 63 Md. 446.

[9] Brown *v.* Walker, *supra;* Ex parte Buskett, 106 Mo. 602, 17 S. W. 753; State *v.* Jack, *supra. Contra,* United States *v.* James, 60 Fed. 257, since overruled by Brown *v.* Walker, *supra.*

[10] Counselman *v.* Hitchcock, 142 U. S. 547. In this case it was held, with doubtful propriety, that the statute in question did not prevent the use of the witnesses testimony to search out other testimony to be used in evidence against him.

[11] 161 U. S. 591.

[12] Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

witness may not refuse to testify because his testimony may bring disgrace upon him.[13] And as to the last question, such statutes have been generally upheld in this country on the ground that they are acts of amnesty, and within the powers of Congress.[14]

In the recent case of *Ex parte Muncy* (Tex.), 163 S. W. 29, the district attorney, under the authority of a Texas statute,[15] and with the consent of the district judge, guaranteed a witness immunity from prosecution and punishment for any matter about which he might testify in regard to a homicide. The Court of Criminal Appeals held, with a vigorous dissent by one judge, that the witness was guilty of contempt in refusing to testify under these circumstances.[16] The decision in this case seems to be sound, and is undoubtedly in line with the opinions of the majority of the courts. In the first place, the witness was promised immunity by the district attorney, and this in itself was sufficient to protect him fully from prosecution without regard to any statute, according to the better view,[17] although there is some authority *contra*.[18] In the second place, the statute gives the witness complete immunity from prosecution or punishment by its very terms, and with such exoneration he may be compelled to testify, according to the better view and the weight of authority.[19] Nor need the transaction be in the nature of a contract between the witness and the State, as was argued in the dissenting opinion, because the statute was enacted for the express purpose of forcing witnesses to testify in such cases.[20]

NEGOTIABILITY OF MORTGAGES SECURING NEGOTIABLE PAPER.—No principle of law is better settled than that the transfer of a debt

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[13] Moline Wagon Co. *v.* Preston, 35 Ill. App. 358; In re Kelly, 200 Pa. St. 430, 50 Atl. 248; Kendrick *v.* Commonwealth, 78 Va. 490. In delivering the opinion in the last case, Judge Fauntleroy said: "A witness who is called upon by the Commonwealth to testify as to violations of her laws, within his observation, may always assert his constitutional privilege and immunity from prosecution and punishment for his own implication in the unlawful act as to which he is compelled to testify; but the courts of Virginia will not recognize the Spartan morality which deprecates not the perpetration, but only the exposure of the crime."

[14] State *v.* Nowell, 58 N. H. 314; Ex parte Cohen, *supra*. See also, People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319.

[15] The statute provides: "Any court, officer or tribunal having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney may subpœna persons and compel their attendance as witnesses to testify as to violations of any of the provisions of the foregoing articles. Any persons so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify."

[16] Section 10, of the Bill of Rights, contains the usual provision against self-incrimination.

[17] In re Taylor, 8 Misc. 159, 28 N. Y. Supp. 500.

[18] Muller *v.* State, 11 Lea (Tenn.) 18.

[19] See cases cited in footnote 9, *supra*.

[20] Griffin *v.* State, 43 Tex. Cr. Rep. 428, 66 S. W. 782.